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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959.

## No. 649

FARM AND HOME AGENCY, INC., PHILIP H. MEADE, CHESTER R. KOZA, E. BERNIE SHELTON and W. HAROLD HIEBERT,

*Petitioners,*

vs.

SECURITIES AND EXCHANGE COMMISSION,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.**

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*To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

The petitioners respectfully show:

## OPINIONS BELOW.

The opinion of the Court of Appeals for the Seventh Circuit is reported at 270 F. 2d 891. The opinion and the order denying petitioners' Petition for Rehearing are set forth in Appendices A and C, respectively, of this Petition. The District Court did not write an opinion.

## JURISDICTION.

The order of the United States District Court, Southern District of Indiana, Indianapolis Division, denying the motions of petitioners for leave to file a motion to vacate and set aside a Consent Decree and for restraining order was entered January 12, 1959. (App. 44) The United States Court of Appeals for the Seventh Circuit affirmed the order of the District Court on October 7, 1959. (App. B, p. 4a, *infra*) Petitioners' Petition for Rehearing was denied by the said Court of Appeals on November 10, 1959. (App. C, p. 5a, *infra*)

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

## QUESTIONS PRESENTED.

1. Does the McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-1015, divest the Securities and Exchange Commission of regulatory jurisdiction over the issuance of common capital stock issued by petitioner, Farm and Home Agency, Inc., a company engaged in the business of insurance regulated by the State of Indiana and the individual petitioners, and consequently divest the United States District Court of jurisdiction to hear and determine suits brought against petitioners under the Securities Act of 1933, 48 Stat. 74; 15 U.S.C. §§ 77a *et seq*?

2. Did the United States District Court have discretion to refuse to entertain a motion filed under Rule 60(b) Federal Rules of Civil Procedure, which charges that a consent decree judgment order previously entered was void for want of jurisdiction over the subject matter of the litigation?

## STATUTE INVOLVED.

McCarran-Ferguson Insurance Regulation Act, §§1011-1015, 15 U.S.C., 59 Stat. 33, as amended:

"AN ACT

"To express the intent of the Congress with reference to the regulation of the business of insurance.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

"SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26,

1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

"(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

"Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

"As used in this Act, the term 'State' includes the several States, Hawaii, Puerto Rico, and the District of Columbia."

Rule 60(b) Federal Rules of Civil Procedure, 28 U.S.C.:

"(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief

from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . ."

## STATEMENT.

On April 16, 1958 the respondent, Securities and Exchange Commission, filed a Complaint in the United States District Court, Southern District of Indiana, Indianapolis Division, against petitioners, the Farm and Home Agency, Inc., Philip H. Meade, Chester R. Koza, E. Bernie Shelton and W. Harold Hilbert. The Complaint alleged that they had engaged in acts and practices which constituted violations of Secs. 5(a) and 5(c) of the Securities Act of 1933, 15 U.S.C. 77e(a) and 77e(c), which proscribe using the mails and means and instruments of transportation and communication in interstate commerce of unregistered securities and sought to enjoin those alleged violations (App. 3, 4). The securities drawn into question were the common capital stock of petitioner, Farm and Home Agency, Inc.

Simultaneously with the filing of the Complaint the Securities and Exchange Commission and the petitioners filed a Stipulation which recited that the Court had jurisdiction of the parties and the subject matter and in which the petitioners consented to the entry of a final judgment perpetually enjoining the petitioners from violating Sections 5(a) and (c) of the Securities Act of 1933 and the rules adopted thereunder in conformity with the demands of the Complaint (App. 6, 7)

On the same date, April 16, 1958, final judgment was entered by the Court against the individual and corporate petitioners, their officers, agents, servants, employees, at-

torneys and assigns permanently enjoining them from directly or indirectly using the instruments of interstate commerce and mails in the sale of the common capital stock of petitioner, Farm and Home Agency, Inc. unless and until a registration statement was in effect with the Securities and Exchange Commission (App. 9-10). This final judgment was entered by and with the consent of all of the petitioners and their then attorneys of record (App. 10).

On November 24, 1958 the petitioners filed a motion for leave to file instanter their Motion to Vacate and Set Aside the final judgment entered April 16, 1958 along with the Motion to Vacate and Set Aside Consent Decree (App. 14).

In their Motion to Vacate and Set Aside Consent Decree petitioners moved under Rule 60(b) of the Federal Rules of Civil Procedure which provides for relief from final judgments, *inter alia,* for "mistake, inadvertence, surprise, or excusable neglect" or if "the judgment is void."

The motion alleged that the final judgment of April 16, 1958 was void in that the District Court had no jurisdiction over either the parties to the judgment or the subject matter thereof (App. 14). The allegation that the final judgment of April 16, 1958 was void was based upon the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. Secs. 1011-1015, which declares, *inter alia,* that the *business of insurance and every person engaged therein* shall be subject to the laws of the several States which relate to the regulation or taxation of such business, and that "No act of Congress shall be construed to invalidate, impair

or supersede any law enacted by any State for the purpose of regulating the business of insurance. . . ."

The Motion to Vacate and Set Aside Consent Decree further charged that, in addition to the judgment and consent decree of April 16, 1959 being void by virtue of the McCarran-Ferguson Act, the Consent Decree was entered by virtue of a mistake of law and fact (App. 14). Paragraph 27 of the Complaint reads as follows:

> "That because of the mistake of fact and law, as aforesaid, by the parties to this action, and because the defendants adopted the legal advice of their counsel which coincided with the jurisdictional assertions of the plaintiff, the defendants and each of them were incorrectly advised as to their legal rights in the premises, and the Consent Decree herein is void and should be vacated and set aside and the restraining order of permanent injunction be dissolved; the defendants herein could not confer jurisdiction of this Court by their consent." (App. 21).

The petitioner, Farm and Home Agency, Inc., is a corporation organized under the General Corporation Act of Indiana and the individual petitioners have been licensed by the Commissioner of Insurance of Indiana and are subject to licensing, supervision and regulation of its Insurance Department. The motion further stated that *the sale of the common stock of the petitioner, Farm and Home Agency, Inc., was registered with the Securities Department of Indiana and a report of the creation and sale of these securities was duly filed and reported to the Commissioner of Insurance of Indiana under a policy of collaboration between the insurance and securities departments of that state* (App. 17).

The motion further recited that during the period involved herein the Department of Insurance of Indiana

exercised supervisory and regulatory authority over any company in the insurance business, soliciting stock or capital contributions to or aiding in the formation of an insurance company (App. 18).

Attached to petitioners' Motion to Vacate as Exhibit "A" (App. 25) was the prospectus issued by petitioner, Farm and Home Agency, Inc., prior to the time the common stock was offered for sale. As stated in paragraph 16 of the motion (App. 18), the common stock of the corporate petitioner was registered with the Indiana Securities Commission and was coordinated with the Commissioner of Insurance under a policy of collaboration between these two departments. Attached as Exhibit "B" to the motion to vacate was a regulation (App. 29) adopted January 2, 1957 providing for the closest possible coordination between the Department of Insurance and the Securities Commissioner of Indiana, in connection with the issuance of securities by an insurance company.

The purpose of the common stock issue by petitioner, Farm and Home Agency, Inc., as stated in its prospectus was: "*To raise additional funds with which to increase the capital and surplus of the Farm and Home Insurance Company, the capital stock of which is all owned by this corporation except directors' qualifying shares so that the Insurance Company may qualify as a* Life Insurance Company *as well as Health and Accident. Also to expand the Insurance Company's business, to enter it in other states; and to add to its reserve and surplus funds.*" (Emphasis supplied.) (App. 25).

Paragraph 11 of the Motion to Vacate (App. 17) stated that all of the defendants were and are engaged in the business of insurance and were, therefore, under the supervision of the Department of Insurance of Indiana and the respondent had full knowledge of these facts.

On December 1, 1958 the petitioners filed a Motion for Restraining Order (App. 38) praying that the District Court enjoin the Securities and Exchange Commission and any persons acting in concert with it from investigating, prosecuting or presenting any evidence to the Grand Jury at Indianapolis, Indiana pertaining to any alleged violations of the Securities Act of 1933 or with respect to any matters embodied in the Consent Decree of April 16, 1958 until further order of the court. This Motion was filed because shortly after petitioners filed their Motion to Vacate it was learned that the respondent was to begin presenting evidence to the United States Grand Jury at Indianapolis arising out of the identical fact situation covered in the Consent Decree of April 16, 1958. Because the petitioners had filed a Motion to Vacate that decree on the ground it was void by virtue of the McCarran-Ferguson Insurance Regulation Act, it was believed the court should first be given an opportunity to rule on that motion before proceedings were instituted by the respondent before the Grand Jury. If the court had sustained petitioners' Motion to Vacate on the ground that the McCarran-Ferguson Act precluded the jurisdiction of the Securities and Exchange Commission, no evidence could have been presented to the Grand Jury by the Government for the same reason.

On December 1, 1958 the District Court continued without date the Motion for Restraining Order pending the disposition of the petitioners' Motion to Vacate and Set Aside Consent Decree (App. 43).

On January 12, 1959 the District Court denied all of the petitioners' motions (App. 44) and, read literally, even the right to file them. No opinion was written or reasons given for the denial of the several motions.

The Court of Appeals, Seventh Circuit, affirmed the order of the District Court. That decision is reported at 270 F. 2d 891. The opinion of the court is set forth in Appendix A, *infra*, p. 1a. A Petition for Rehearing was denied. Appendix C, p. 5a.

The Court of Appeals did not decide whether or not the McCarran-Ferguson Insurance Regulation Act divested the respondent, Securities and Exchange Commission, of jurisdiction over petitioners. It stated that the "time to appeal has expired" by which the Court of Appeals meant that it was fatal to petitioners for not appealing from the Consent Decree of April 16, 1958. Its decision also rested on the assertion that a District Court may properly exercise its discretion by refusing to entertain a motion under Rule 60(B), Federal Rules Civil Procedure, on the ground that the court lacked jurisdiction of the subject matter.

## REASONS FOR GRANTING WRIT.

1. The issue of whether the McCarran-Ferguson Act permits companies engaged in the business of insurance to issue capital stock to raise working and qualifying capital after complying with all state statutes and regulations without registering their securities with the Securities and Exchange Commission is a question of great public importance to one of the largest industries in the United States.

2. The issue of whether a District Court may refuse on the ground it is within the Court's discretion to entertain a motion, filed under Rule 60(b), Fed. Rules Civil Procedure, alleging that a decree previously entered was void for want of the Court's jurisdiction of the subject matter, is a recurring question involving a fundamental rule of procedure in the District Courts.

## ARGUMENT.

### I.

### THE EXPLICIT LANGUAGE OF THE McCARRAN-FERGUSON ACT, WHEN READ IN THE LIGHT OF THE DECISIONS WHICH PRECEDED IT AND LED TO ITS ENACTMENT, AND THE APPLICABLE STATUTES OF THE STATE OF INDIANA COVERING THE REGULATION OF THE BUSINESS OF INSURANCE AND THE ISSUANCE OF SECURITIES BY INSURANCE COMPANIES, DEPRIVES THE SECURITIES AND EXCHANGE COMMISSION AND THE DISTRICT COURT BELOW OF JURISDICTION OVER THE PETITIONERS.

In 1868 this Court in *Paul* v. *Virginia*, 75 U.S. 168, held that the business of insurance was not "commerce" and accordingly the interstate activities of that business fell outside the ambit of the Commerce Clause of the United States Constitution. This position was followed uniformly for a period of seventy-five years, *Hooper* v. *California*, 155 U.S. 648 (1895); *New York Life Insurance Company* v. *Deer Lodge County*, 231 U.S. 495 (1913), and precluded the exercise by Congress of statutory jurisdiction over the business of insurance. Simultaneously, the practical consequence was the erection by the States of elaborate statutory and regulatory schemes blanketing the business of insurance in all its facets.

In 1944 this long-standing rule was convulsed by this Court in *United States* v. *South-Eastern Underwriters*, 322 U.S. 533, which held that insurance was commerce within the Commerce Clause and that the Sherman and Clayton Anti-Trust Acts applied to the business of insurance. "In all cases in which the Court has relied

upon the proposition that 'the business of insurance is not commerce,' its attention was focused on the validity of State statutes—the extent to which the Commerce Clause automatically deprived States of the power to regulate the insurance business. Since Congress at no time attempted to control the insurance business, invalidation of the state statutes would practically have been equivalent to granting insurance companies engaged in interstate activities a blanket license to operate without legal restraint." 322 U.S. 544.

The *South-Eastern Underwriters* decision thus opened the whole area of the business of insurance to Congressional regulation. Congress was handed the opportunity of moving into the insurance field with a comprehensive regulatory scheme and undoing the seventy-five year void ushered in by *Paul* v. *Virginia*.

Congress, however, chose not to seize the opportunity granted by this Court in the *South-Eastern Underwriters* decision. At the conclusion of lengthy hearings begun in the 78th Congress and continued into the 79th Congress, the McCarran-Ferguson Insurance Regulation Act was enacted. 15 U.S.C. Secs. 1011-1015.

The confusion within the insurance industry found articulation in House Report No. 143, House Committee on the Judiciary, Feb. 13, 1945:

> "Already many insurance companies have refused while others have threatened refusal to comply with State tax laws, as well as with other State regulations, on the ground that to do so, when such laws may subsequently be held unconstitutional in keeping with the precedent-smashing decision in the Southeastern Underwriters case, will subject insurance executives to both civil and criminal actions for

misappropriation of company funds." (See also Report of the Committee on the Judiciary, U.S. Senate, Senate Report No. 20, 79th Congress, 1st Session, 1945)

Evidence of the intent of Congress to leave the regulation of insurance in all its facets to the States is to be found in the following exchange on the floor of the Senate between Senators Ferguson and O'Mahoney relating to Section 2(b) of the McCarran Act:

> "Mr. Ferguson: I think it should be added in reply to the Senator from Kentucky (Mr. Barkley) that there is no attempt here to have Congress throttled in the future in acting upon insurance legislation. Subsection (b) of section 2 provides that if Congress does act, the act shall specifically relate to the business of insurance.
>
> "Mr. O'Mahoney: That is correct.
>
> "Mr. Ferguson: What we have in mind is that the insurance business, being interstate commerce, if we merely enact a law relating to interstate commerce, *or if there is a law now on the statute books relating in some way to interstate commerce, it would not apply to insurance.* We wanted to be sure that the Congress, in its wisdom, would act specifically with reference to insurance in enacting the law.
>
> "Mr. O'Mahoney: In other words, *no existing law and no future law* should, by mere implication, be applied to the business of insurance.
>
> "Mr. Ferguson: That is correct."
>
> (Con. Record, 79th Cong., 1st Sess. Proceedings in Senate, 2-27-45, p. 1487. Emphasis added.)

The position of the respondent, Securities and Exchange Commission, is precisely the reverse of the avowed intent of Congress in the enactment of the McCarran Act as expressed in the above floor exchange. Respondent seeks to bring the petitioners within the embrace of the Securities Act of 1933. However, that Act is plainly a "law now on

the statute books relating in some way to interstate commerce." In Senator Ferguson's words: "It would not apply to insurance." And if the respondent takes an even more tenuous position by arguing that the Securties Act of 1933 is applicable to the business of insurance by implication it is met with Senator Ferguson's statement that "no existing law and no future law should, *by mere implication*, be applied to the business of insurance." (Emphasis added) Thus, the presence in the Act itself of the critical phrase, "specifically relates to the business of insurance", is accounted for.

The general purpose of the McCarran Act, projected against the judicial history preceding its passage, is cogently expressed in its first section:

> "That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

It would appear unarguable that the word "continued", used as the adjective modifying "regulation and taxation", refers to the conditions existing prior to the *South-Eastern Underwriters* case. "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429 (1946).

The decision in the *South-Eastern Underwriters* case created a gaping void in the field of federal regulation of the insurance business. There simply was no legislation, the Congress having been pre-empted for seventy-five years by *Paul* v. *Virginia*. The States, however, had

proceeded to establish a comprehensive statutory-regulatory scheme covering the business of insurance. Thus, the Congressional command contained in the first section of the McCarran-Ferguson Act that it was Congress' intent to leave the regulation and taxation of the business of insurance to the States was designed to fill the void left by the *South-Eastern Underwriters* case and to prevent chaos from reigning in the insurance industry. Mr. Chief Justice Stone, dissenting in the *South-Eastern Underwriters case*, said:

> "But the immediate and only practical effect of the decision now rendered is to withdraw from the states in large measure, the regulation of insurance and confer it on the national government, which has adopted no legislative policy and evolved no scheme of regulation with respect to the business of insurance." 322 U.S. 580-581.

It ought not to be assumed that Congress is incapable of reducing its intent to clear language, especially after extensive hearings covering two sessions of Congress.

Section 2 of the McCarran Act states that *no* Act of Congress shall be *construed* to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance unless the Act specifically relates to the business of insurance. Congress was evidently unsatisfied with the phrase "no Act of Congress," and proceeded to draft into the statute a rule of construction with the insertion of the word "construed" to underscore its emphasis.

The Securities Act of 1933 clearly does not qualify as a statute specifically relating to the business of insurance. Indeed, insurance policies and annuity contracts are specifically exempted from it. Section 77(c), Title 15 U.S.C. exempts:

"Any insurance or endowment policy or annuity contract or optional annuity contract, issued by a corporation subject to the supervision of the insurance commissioner, bank commissioner, or any agency or officer performing like functions, of any State or Territory of the United States or the District of Columbia."

Far from being a statute "specifically relating" to the business of insurance, the Securities Act of 1933 specifically took the business of insurance out from under its terms. It cannot be argued that any Federal statute casually employing the word "insurance" somewhere in its text qualifies as one "specifically relating" to the business of insurance within the explicit language of the McCarran Act and the abundantly evident intent of Congress.

The McCarran Act evidences precise draftsmanship. It specifies the areas in which the federal power is retained by the Congress: the Sherman Act remains applicable to agreements to boycott, coerce or intimidate (Sec. 3(b)); the Sherman Act and the Clayton and the Federal Trade Commission Acts remain applicable (after June 30, 1948) to the degree the business of insurance is not regulated by the States (Sec. 2(b)); the National Labor Relations Act, the Fair Labor Standards Act of 1938, and the Merchant Marine Act of 1920 continue with full application (Sec. 4).

Congress obviously took great pains to carve out those acts and conditions under which the broad scope of the McCarran Act would not apply. The inclusion in the McCarran Act of six federal statutes meriting special treatment furnishes additional proof, if any were needed, that Congress took great care in demarcating the scope of the McCarran Act. The Securities Act of 1933 was never mentioned.

In the McCarran Act the Congress construed the Securities Act of 1933 because it directs that no Act of Congress shall be *construed* to invalidate, impair or supersede the laws of a State for the purpose of regulating the business of insurance. That Act is not a regulatory act as are most acts of Congress. It does not regulate anything. It is a legislative construction act.

This Court has given great consideration to Acts of Congress of an interpretive nature. Congress may pass an Act defining the terms of an existing statute, declaring its construction and applicability to statutes passed before its enactment. *Bailey* v. *Clark*, 21 Wall. 284, 288 (1874). In construing doubtful phrases in a statute the court will adopt the legislature's own interpretation of the language by a subsequent statute. *Alexander* v. *Alexandria*, 5 Cranch 1-2 172, 174 (1809); *Stockdale* v. *Atlantic Insurance Co.*, 20 Wall. 323, 331 (1873).

As stated in petitioners' Motion to Vacate and Set Aside Consent Decree, the petitioners were licensed and engaged in the business of insurance in the State of Indiana. (App. 17). Being thus licensed they were subject to state sanctions and penalties. The issuance of securities by the petitioner, Farm and Home Agency, Inc., was to further its general corporate purposes by aggregating working capital to engage in the business of insurance. That objective was fully disclosed in the Prospectus, Exhibit "A" of the Motion to Vacate (App. 25). Chapter 33, Sec. 49-3312 Burns Indiana Statutes, forms the nexus between the Department of Insurance of Indiana and the Securities Commission:

> "The department [of insurance] may examine into the affairs of any insurance company doing business in the state and of any company engaged in or professing to be engaged in the organization of promot-

ing or soliciting stock or capital contributions to or aiding in the formation of an insurance company or of any company which holds the capital stock of an insurance company for the purpose of controlling the management thereof as voting trustee or otherwise."

The Prospectus, filed with the Securities Commission of Indiana, carefully advised the public as follows:

"On December 17, 1954, the Insurance Company called Farm and Home Insurance Company was formed by the Agency Company. It was incorporated on that date with a capital of $100,000.00. On February 1, 1955, having a paid-in cash capital of $100,000.00 and a paid-in cash surplus of $100,000.00 (although the minimum surplus requirement was $50,000.00) it received its license to do a health and accident business in Indiana from the Insurance Commissioner and it has been so engaged since. All the capital stock of the Insurance Company is owned by the Agency Company, except the directors qualifying shares. (The Agency Company owns 89% and the 11 directors own 11%)." (App. 26)

Furthermore, the Prospectus (App. 26) states the purpose of the sale in the following language and states the securities were registered with the Indiana Securities Commission:

"The said 20,000 shares of the Agency Company stock were registered with the Indiana Securities Commission and sold for $15.00 per share, following which the Insurance Company was formed and the proceeds from the sale of stock distributed as follows: 1. To the Farm and Home Insurance Company, $100,000.00 capital and $100,000 surplus."

The foregoing amply demonstrates the jurisdiction of the State of Indiana over companies engaged in the business of insurance and the issuance of securities by them.

Exhibit "B", annexed to petitioners' Motion to Vacate and Set Aside Consent Decree (App. 29), was adopted January 2, 1957 by the Department of Insurance and constitutes additional persuasive evidence of the degree to which the State of Indiana exercises supervision over insurance companies issuing securities. The regulation establishes Department of Insurance supervision over:

"(a) Any and all contracts, letters, memoranda, plans, resolutions, or other documents (exclusive of those expressly required to be filed under any section of the Indiana Insurance Law) pertaining in any way to the organization or promotion of the subject company, or to the rights and duties of the organizers *inter se* or in relation to the company, or pertaining to the gain or profits the organizers contemplate receiving from the corporate venture.

"(b) Stock subscription agreements.

"(c) Note or other promissory instrument or instruments for use incident to the subscription or payment for stock in the subject company.

"(d) Prospectus and any other promotional literature for use in selling stock of the subject company.

"(e) Registration certificate or certificates issued by the Securities Commission of Indiana, relative to the stock of the subject company and its sale through dealers.

"f) The names and addresses of all individuals, partnerships, and corporations which by contract have been authorized to solicit stock subscriptions and the agreement or agreements under which such person or persons or organizations will operate and be compensated.

"(g) The number of shares of stock to be offered in the first issue and the price at which such stock will be offered and sold.

"(h) An estimate of the maximum expense of issuing and selling capital stock of the first issue and in accomplishing all other organizational procedures." (App. 30, 31)

## II.

## RAISING CAPITAL TO ENGAGE IN THE BUSINESS OF INSURANCE IS PART OF THE BUSINESS OF INSURANCE AND, THEREFORE, THE McCARRAN-FERGUSON ACT APPLIES TO THE ISSUANCE AND SALE OF SECURITIES BY A COMPANY ENGAGED IN THE BUSINESS OF INSURANCE AND PERSONS ASSOCIATED THEREWITH.

Underlying the position of the respondent, Securities and Exchange Commission, is the assumption that raising capital funds by an insurance company is not part of the "business of insurance." Raising capital is part of any business. According to classical economic doctrine the factors of production are land, labor, capital and entrepeneur. They are interdependent. One factor without the other cripples the business enterprise. In the insurance business a company cannot sell insurance policies, undertake risks and pay claims without capital.

It is common knowledge that an insurance company can not be formed under the laws of most states without complying with elaborately-stated capitalization and reserve requirements. One of the evils sought to be cured by the States when they enacted their insurance laws was the undercapitalization of companies unable to meet claims. Contrary to the position of the respondent, the capital requirements of insurance companies constitute an ever-present problem in the conduct of their business.

In *Securities and Exchange Commission* v. *Variable Annuity Life Insurance Co.*, 359 U.S. 65, 79 S. Ct. 618 (1959), this Court held that the variable annuity issued and sold by the Variable Annuity Life Insurance Company

(VALIC) did not constitute insurance and, therefore, the company came within the purview of the Investment Company Act, 54 Stat. 789, 15 U.S.C. Sec. 80a. Respondents in that case had argued that they were regulated under the insurance laws of the District of Columbia and thus the McCarran-Ferguson Act precluded prosecution by the Securities and Exchange Commission. This argument was rejected by Mr. Justice Douglas, writing for the majority in these words:

> "But we conclude that the concept of 'insurance' involves some investment risk-taking on the part of the company. The risk of mortality, assumed here, gives these variable annuities an aspect of insurance. Yet it is apparent, not real; superficial, not substantial. In hard reality the issuer of a variable annuity that has no element of a fixed return assumes no true risk in the insurance sense. . . . For in common undertaking 'insurance' involves a guarantee that at least some fraction of the benefits will be payable in fixed amounts." 359 U.S. 71, 79 S. Ct. 622.

With this holding and with the above words counsel respectfully urges that this Court in the *VALIC* decision found it unnecessary to decide whether or not the McCarran-Ferguson Act preempted S.E.C. jurisdiction over the issuance of securities by an insurance company. Despite the 5-4 split, with lengthy concurring and dissenting opinions, the holding of the case as enunciated in the short opinion of Mr. Justice Douglas can be succinctly stated in the following syllogism as the opinion applies to the McCarran-Ferguson Act: *The McCarran-Ferguson Act applies only to the "business of insurance"; VALIC's variable annuities were not insurance; therefore, the McCarran-Ferguson Act does not apply in the case.*

Thus is drawn a critical difference between the type of investment at issue in the *VALIC* decision and the one

at bar. In *VALIC* the company was offering for sale a hybrid annuity-investment contract by which policyholders risked their payments in the success or failure of the investment policy of the company.

Therefore, following the function versus form analysis of Mr. Justice Brennan, it is abundantly evident that the State of Indiana does protect the type of investment in insurance companies now before this Court. It has done so historically and it is doing so now. This takes on added color when juxtaposed with the McCarran-Ferguson Act injunction that the policy of Congress is that the "continued regulation and taxation by the several States of the business of insurance is in the public interest . . ." (Sec. 2(a)).

Mr. Justice Brennan announces that the States are not equipped to regulate the problems unique to the variable annuity. "The traditional state insurance department . . . simply does not touch the points of definition of investment policy and investment technique, and control over investment policy changes and over the interests of men who shape the policies of investment and furnish investment advice that the 1940 Federal Act provides." 359 U.S. 79, 79 S. Ct. 626. Regardless of the name by which the variable annuities were labeled, "administering them also involves a very substantial and in fact predominant element of the business of an investment company, . . . totally foreign to the business of a traditional life insurance and annuity company, as traditionally regulated by state law." 359 U.S. 81, 79 S. Ct. 627. "In this sort of operation, examination by state insurance officials to determine the adequacy of reserves and solvency becomes less and less meaningful." 359 U.S. 85, 79 S. Ct. 629.

It is clear the holding of the *VALIC* case was simply that VALIC was operating as an open-end investment

trust and thus subject to the Investment Company Act of 1940; it did not hold that the Securities Act of 1933 applied to the issuance of common capital stock for the purpose of aggregating working capital by an insurance company.

The minority in the *VALIC* case in an opinion written by Mr. Justice Harlan joined by Justices Frankfurter, Clark and Whittaker, was of the view that despite the hybrid character of the variable annuity it ought not to be taken from the traditional field of insurance. Although perhaps different from other types of insurance, the variable annuity is nonetheless insurance and, therefore, "The Court's holding that these two companies are subject to SEC regulation stems from its preoccupation with a constricted 'color matching' approach to the construction of the relevant federal statutes which fails to take adequate account of the historic congressional policy of leaving regulation of the business of insurance entirely to the States." 359 U.S. 96, 79 S. Ct. 635.

> "It would be carrying coals to Newcastle to re-examine here the history of that policy which was fully canvassed in the several opinions of the Justices in *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533, . . . and which was again implicitly recognized by this Court as recently as last Term when, in *Federal Trade Comm'n.* v. *National Casualty Co.*, 357 U.S. 560, . . . we declined to give a niggardly construction to the McCarran Act." *Ibid.*

The *VALIC* decision reversed the Court of Appeals for the District of Columbia, 257 F. 2d 201, which in turn had affirmed the District Court for the District of Columbia, 155 F. Supp. 521. The District Court opinion, like the minority in the Supreme Court, felt that because VALIC was licensed and regulated by the insurance department

of the District the McCarran-Ferguson Act precluded S.E.C. jurisdiction. Likewise, the Court of Appeals held that the definitions in the Securities Act of 1933 and the Investment Company Act of 1940 indicated that if the insurance commissioner of a state subjects the business of insurance to his supervision, "it is the business of insurance." 257 F. 2d 205, and it is erroneous to confine the definition of insurance to what it has been in the past. *Ibid.*

It is respectfully urged that the implied holding of this Court in the *VALIC* case was that if the variable annuity had qualified as "insurance" the Court would have held that the jurisdiction of the Securities and Exchange Commission was barred by the McCarran-Ferguson Insurance Act.

No court thus far has squarely held that the McCarran-Ferguson Act either does or does not pre-empt S.E.C. jurisdiction over companies engaged in the business of insurance and the issuance by them of common capital stock for purposes of aggregating working capital. In *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, the issue was whether the direct action statute of Louisiana permitting direct actions against insurers entered an area withdrawn from the States by virtue of the federal maritime power. Mr. Justice Frankfurter, writing for the majority, so phrased the issue at p. 413. The Court held that the federal maritime power and the Act to Limit Liability of 1851 made the McCarran-Ferguson Act "not relevant."

In *Prudential Insurance Company* v. *Benjamin*, 328 U.S. 408, 429 (1945), this Court said that it was Congress' intention to give support to existing and *future* state systems for regulating the business of insurance "by removing obstructions which might be thought to flow from

its own power, whether dormant or exercised, except as otherwise *expressly provided* in the Act itself or in *future* legislation." (Emphasis added.)

> "Moreover . . . Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted . . . Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." 328 U.S. 408, 430.

In *United States v. Sylvanus*, 192 F. 2d 96 (C.A. 7th, 1951), the federal government instituted criminal proceedings under Title 18, Sec. 1341 and 371, U.S.C., for using the mails to defraud in connection with the sale of insurance policies. It did not involve a proceeding under the Securities Act of 1933. Petitioners here do not argue that the McCarran-Ferguson Act suspends the prosecution by the government of crimes unrelated to what traditionally has been embraced in the phrase "business of insurance." Indeed, this is precisely what the Court of Appeals said:

> "However, we believe that it can not properly be said that this indictment has to do with the regulation of insurance business in Illinois. Rather, it has to do with the question of whether defendants have used the mails in pursuance of a scheme so as to manipulate their authorized regulated business in Illinois as to result in fraudulent deception of its prospective policy holders." 192 F. 2d 96, 100.

In the recent case of *Travelers Health Association v. F. T. C.*, 262 F. 2d 241 (C.A. 8th, 1959), the issue was whether the Federal Trade Commission had jurisdiction to regulate the advertising practices of the Travelers

Health Association in the promotion and sale by mail and whether the practices of that insurance company were false and misleading under the Federal Trade Commission Act, 15 U.S.C. §45. The insurance company argued that the McCarran-Ferguson Act precluded jurisdiction by the F.T.C. The Attorney General of the State of Nebraska filed a brief for the State of Nebraska as Amicus Curiae in support of the position of the insurance company. Nineteen other States joined in the Amicus Curiae brief of Nebraska. The Court of Appeals held that the F.T.C. is and was without authority to regulate the practices of the insurance company in soliciting insurance. The court stated, 262 F. 2d 243, as follows:

> "The obvious purpose of the McCarran-Ferguson Act was to remove the cloud [*sic*] cast by the case of *United States* v. *South-Eastern Underwriters Association* . . . upon the right of the States to continue to regulate and to tax interstate insurance business under their own laws, as they had done for some seventy-five years. The history and effect of the Act has already been adequately explained. See *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 429-431 . . . *Maryland Casualty Co.* v. *Cushing*, 347 U.S. 409, 413 . . . *North Little Rock Transportation Co., Inc.* v. *Casualty Reciprocal Exchange*, 8 Cir., 181 F. 2d 174, 176; *American Hospital & Life Insurance Co.* v. *Federal Trade Commission*, 5 Cir., 243 F. 2d 719; *National Casualty Company* v. *Federal Trade Commission*, 6 Cir., 245 F. 2d 883, 887-888; *Securities and Exchange Commission* v. *Variable Annuity Life Ins. Co. of America*, D.C.D.C., 155 F. Supp. 521, 527."

The Court below in its opinion simply did not discuss or decide the critical legal problems posed by the McCarran-Ferguson Act.

It is respectfully urged that it was incumbent upon that court to decide the substantive issue of whether or

not the District Court had subject matter jurisdiction when it entered the Consent Decree of April 16, 1958. It would seem unchallengeable to say that if the District Court lacked jurisdiction because of the McCarran-Ferguson Act then, clearly, the court below committed error when it held that it was within the "discretion" of the District Court to deny petitioners' motion to vacate and set aside the Consent Decree.

## III.

## IF THE DISTRICT COURT LACKED JURISDICTION OF THE SUBJECT MATTER IT HAD NO DISCRETION TO DENY PETITIONERS' MOTION TO SET ASIDE AND VACATE THE CONSENT DECREE.

The Court of Appeals, Seventh Circuit, in its opinion (App. A, p. 3a) stated that "a motion to vacate a judgment under Rule 60(b) is addressed to the sound legal discretion of the court . . ." It is submitted that the court below erred in its affirmance of the District Court for the reason that it was essential and a condition precedent to that ruling to determine whether or not the McCarran-Ferguson Act divested the District Court of jurisdiction over the subject matter. Neither the District Court nor the Court of Appeals decided that issue.

If the effect of the McCarran-Ferguson Act is to divest District Courts of jurisdiction over companies and persons engaged in the business of insurance then, clearly, the Consent Decree of April 16, 1958 must be set aside as void because it was a legal nullity.

> "The theory underlying the concept of a void judgment is that it is legally ineffective—a legal nullity; and may be vacated by the court which rendered it at any time. Laches of a party can not cure a judgment that is so defective as to be void; laches cannot infuse the judgment with life. Further, it may, when appropriately called in question, be adjudged void

> in any collateral proceeding, and this collateral attack may be made at any time . . . the 'reasonable time' limitation must generally mean no time limit, although there may be exceptional situations where the reasonable time limitation would require diligence on the part of the movant." 7 Moore's *Federal Practice*, p. 274.

It is utterly immaterial whether or not a decree or order was entered by the consent of the parties or not. If the court lacked jurisdiction over the subject matter the decree or order is void. A court cannot endow itself with jurisdiction and certainly parties to an action cannot confer subject matter jurisdiction on a court. In *Walling* v. *Miller*, 138 F. 2d 629, 630 (C.A. 8th, 1943) the court said:

> "A court which, having jurisdiction of the parties and of the subject matter, renders a consent decree, if it sustains a motion of one of the parties to vacate such decree, not only sanctions the breach of contract but in effect becomes a party to the breach. On the other hand, if the court lacks power to adjudicate such a cause of action in the first instance, it lacks power also to sanction a stipulation of settlement by entering a consent decree."

## CONCLUSION.

For the reasons heretofore set forth, it is respectfully submitted that this Court should issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review this case.

Respectfully submitted,

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# APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12602 SEPTEMBER TERM, 1959 SEPTEMBER SESSION, 1959.

SECURITIES AND EXCHANGE COMMISSION,
*Plaintiff-Appellee,*
v.
FARM AND HOME AGENCY, INC., an Indiana corporation, PHILIP H. MEADE, CHESTER R. KOZA, E. BERNIE SHELTON and W. HAROLD HILBERT,
*Defendants-Appellants.*

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

OCTOBER 7, 1959

Before MAJOR, SCHNACKENBERG and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* On April 16, 1958, a final judgment enjoining Farm and Home Agency, Inc., an Indiana corporation, Philip H. Meade, Chester R. Koza, E. Bernie Shelton and W. Harold Hilbert, herein referred to as defendants, from violating sections 5 (a) and 5 (c) of the Securities Act of 1933, 15 U.S.C. § 77e (a) and (c), was entered *by consent* in the district court. The judgment was based upon a complaint filed by the Securities and Exchange Commission, plaintiff, alleging that defendants had engaged in acts and practices which constituted viola-

tions of said sections, which proscribe using the mails and means and instruments of transportation and communication in interstate commerce of unregistered securities, and which complaint sought to enjoin those alleged violations. The securities involved were the common capital stock of Farm and Home Agency, Inc.

On November 24, 1958, defendants asked leave to file a motion to vacate the consent judgment. That motion, with an accompanying brief, appears in the record.

On December 1, 1958, defendants filed a motion for a restraining order seeking to enjoin the Securities and Exchange Commission or persons in active concert with it, from investigating, prosecuting, or presenting any evidence to a grand jury pertaining to "alleged violations" of section 5 of the Securities Act "or any other matters or things set forth in the consent decree of April 16, 1958."

After consideration of briefs and oral argument, the district court on January 12, 1959, entered the following order, from which this appeal was taken:

> "The defendants' motion for restraining order and motion for leave to file instanter the motion to vacate and set aside the decree of permanent injunction entered April 16, 1958 and in support thereof, file their brief herewith, being submitted for the consideration of the Court, and the Court being duly advised, now denies each of said motions."

Relying upon rule 60 (b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., Rule 60 (b), defendants contend that the judgment of April 16, 1958 was void in that the district court had no jurisdiction over either the parties to the judgment or the subject matter. They also charge that the decree was entered by virtue of a mistake of law and fact by the parties to the action "because the defendants adopted the legal advice of their counsel which coincided with the jurisdictional assertions of the plaintiff", and because "the defendants and each of them were incorrectly advised as to their legal rights in the premises";

and "that all of the defendants were and are engaged in the business of insurance and were, therefore, under the supervision of the Department of Insurance of Indiana".

It is apparent that, as the time to appeal has expired, defendants are asking us to review a decree enjoining them from violating the Securities Act, to the entry of which they fully consented while represented by counsel. § 22 (a) of the Securities Act[1] grants to district courts of the United States jurisdiction of "offenses and violations" under the Securities Act. There is, therefore, no question that the court below had jurisdiction to enter the consent judgment. We cannot review alleged error in this proceeding. No appeal was taken. Numerous cases support the view that a motion to vacate a judgment under Rule 60 (b) is addressed to the sound legal discretion of the court and that its determination will not be disturbed upon appeal except for an abuse of discretion. *Elgin Nat. Watch Co.* v. *Barrett*, 5 Cir., 213 F.2d 776, 780; *Independence Lead Mines Co.* v. *Kingsbury*, 9 Cir., 175 F.2d 983, 988; *Western Union Telegraph Co.* v. *Dismang*, 10 Cir., 106 F.2d 362, 364; *Bush* v. *Bush*, D.C., 63 F.2d 134, 135; and *Jones* v. *Jones*, 7 Cir., 217 F.2d 239, 241.

The relief sought by the restraining order is ancillary to defendants' motion to vacate the consent decree, and, therefore, the right to such restraining order falls when we affirm the district court's order denying defendants' motion to file a motion to vacate the consent decree.

For the reasons herein set forth, the order of the district court is affirmed.

AFFIRMED.

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[1] 15 U.S.C.A. § 77v (a).

## APPENDIX B.

[Judgment Order]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

October 7, 1959

Before

Hon. J. Earl Major, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

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| Securities and Exchange Commission, *Plaintiff-Appellee*, vs. Farm and Home Agency, Inc. et al., *Defendants-Appellants*. | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. |
| No. 12602 | |

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the order of the said District Court in this cause appealed from entered therein on January 12, 1959, be, and the same is hereby, Affirmed, in accordance with the Opinion of this Court filed this day.

## APPENDIX C.

[Order denying Petition for Rehearing]

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

November 10, 1959

Before

Hon. J. Earl Major, Circuit Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Latham Castle, Circuit Judge

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| Securities and Exchange Commission, *Plaintiff-Appellee*, vs. Farm and Home Agency, Inc. et al., *Defendants-Appellants*. | Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. |
| No. 12602 | |

It is ordered by the Court that the Petition for Rehearing, filed by Appellants in the above entitled cause, be, and the same is hereby, Denied.